Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: IA/43191/2013, IA/43189/2013, IA/43190/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 31st October 2014	**On 7th November 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE LINDSLEY

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MS NISHA SOBRUN (1)
MISS ASHWINA SOBRUN (2)
MASTER VAIBHAV SOBRUN (3)
(NO ANONYMITY ORDER MADE)

Respondents

Representation:

For the Appellant: Mr S Tarlow, Senior Home Office Presenting Officer
For the Respondent: Mr Otchie, Counsel, instructed by Cubism Law

DETERMINATION AND REASONS

Introduction

1. Although this is an appeal by the Secretary of State I will refer to the parties as they were before the First-tier Tribunal.

2. The appellants are citizens of Mauritius. The first appellant is the mother the second and third appellants. The first appellant was born on 9th March 1980, the second appellant on 9th April 2008 and the third appellant on 3rd March 2002. The first and third appellants arrived in the UK on 26th December 2005: the first appellant had leave as a student and the third appellant as her dependent. The second appellant was born in the UK. The appellants leave as a student/ student dependents expired on 27th November 2012. On 23rd November 2012 they applied for further leave to remain in the UK based on their right to respect for private life, in accordance with Article 8 ECHR. These applications were refused on 4th October 2013 and the appellants appealed. The appeals against the decisions were allowed by First-tier Tribunal Judge AJ Parker in a determination promulgated on the 1st September 2014.

3. Permission to appeal was granted by Designated Judge of the First-tier Tribunal MacDonald on 24th September on the basis that it was arguable the First-tier Tribunal had erred in law by failing to consider the citizenship of the children, and that they did not hold British citizenship and the distinctions made in Zoumbas v SSHD [2013] UKSC 74 and EV (Philippines) v SSHD [2014] EWCA Civ 874 between the weight to be given to those of British citizenship and those without.

4. The matter came before me to determine whether the First-tier Tribunal had erred in law.

Submissions – Error of Law

5. Mr Tarlow relied upon the grounds of appeal. These contended, in summary, that the First-tier Tribunal erred in law because as the second and third appellants in this case are Mauritian children rather than British citizen children the degree of difficulty in relocating to Mauritius did not render the decisions to relocate them disproportionate. This was clearly a relevant factor, see paragraph 24 of Zoumbas, as they had no right to be educated in the UK. Further in accordance with Nasim (Article 8) [2014] UKUT 00025 (which relied upon Patel & Ors v SSHD [2013] UKSC 72) as they would be removed as a family there was no interference with their right to respect for family life and Article 8 had very little utility in cases which did not interfere with a person's moral and physical integrity. Mr Tarlow submitted that the citizenship the child appellants hold does affect the reasonableness of their reintegration if required to leave as it is bound up with their understanding of the country of removal in terms of culture and other matters.

6. Mr Otchie initially began his submissions on the rather surprising basis that Judge Parker had determined the appeal under paragraph 276ADE of the Immigration Rules so these wider issues were not needed to be considered. However I drew his attention to the fact that he had conceded at the hearing that the appellants could not satisfy the

Immigration Rules, and that it was only Article 8 beyond these Rules that was in issue: see paragraph 8 of the determination.

7. He then argued that in fact that Judge Parker had considered the nationality of the appellants. He had recorded it at paragraph 1 of his determination and said that he considered all factors at paragraph 27. He suggested that Zoumbas did not make nationality a factor, and referred me to paragraph 10 of the judgement. He said that children could not be reasonably removed if they had been in the UK for seven years so it was clear that nationality was not always a factor; and that nationality was an irrelevance from the stand-point of the child who may not even be aware which nationality they hold thus making it an artificial consideration.

8. At the end of the hearing I said that I found that the First-tier Tribunal had erred in law for the reasons set out below and that I would set the determination aside in its entirety. The parties both said they were happy to proceed with the re-making of the decision. They were both happy to proceed on the basis that the evidence was agreed; with no challenge being made to the credibility of the appellants or the veracity of the documents before the Tribunal. It was agreed that it was open to Mr Otchie to argue that the appellant could meet the requirements of the Article 8 ECHR Immigration Rules at paragraph 276ADE, or generally.

Conclusions – Error of Law

9. In the findings and conclusions section of the determination of Judge Parker there is no reference to the second and third appellants being of Mauritian nationality in the consideration of Article 8 ECHR outside of the Immigration Rules.

10. The Supreme Court case of Zoumbas clearly states that nationality is a relevant factor when considering the best interests of non-British citizen children facing removal with a non-British citizen parent who no longer has permission to stay in the UK, but who argues that the family should be allowed to remain on the basis of their private life here under Article 8 ECHR outside of the Immigration Rules, see paragraph 24 of this judgement. Paragraph 10 of the judgement is the submission of counsel for Mr Zoumbas not the decision of the Supreme Court. Similarly the Court of Appeal in EV (Philippines) lists the factors on which the best interest of the child will depend in such a case at paragraph 35, and the final factor is again consideration of any rights the child may have (or not) as a British citizen.

11. I find that Judge Parker erred in law by failing to be guided by the higher courts in not considering the citizenship of the second and third appellants when deciding if their removal would be a breach of their right to respect for private life in accordance with the UK's obligations

under Article 8 ECHR outside of the private life provisions set out in the Immigration Rules.

12. It cannot be said that failure to consider this factor might not have led the First-tier Tribunal to come to a different decision, particularly as it was considered as very significant in both Zoumbas and EV (Philippines), so I find this failure to be a material error of law.

Evidence & Submissions – Re-making

13. As noted above the evidence in its entirety was accepted by the respondent as being credible.

14. Mr Tarlow relied upon the refusal letter. In summary this says as follows. It was clear that there was no argument that the appellants' family life would be affected by their removal as they would be removed together. It was not accepted that the first appellant had been in the UK for 20 years or that they had no ties (social, cultural or family) with the Philippines so she could not succeed under paragraph 276ADE of the Immigration Rules either. It was not considered that there were any exceptional circumstances in this case which should lead to a grant of leave based on Article 8 ECHR outside of the Immigration Rules.

15. In submissions Mr Tarlow considered whether the third appellant could meet the requirements of paragraph 276ADE as it was accepted by the Secretary of State that he had (unlike the second appellant) been in the UK for more than 7 years at the time of application and was under 18 years of age. Mr Tarlow submitted however that the third appellant could not meet the requirement that it would not be "reasonable" to expect him to leave the UK. He said his lack of British citizenship was a factor in consideration of reasonableness in this paragraph; further he would be returning with his family and to a place where his grandmother and great-grandmother lived even if he had little memory of the place. If all the appellants were considered outside of the Immigration Rules their removal was proportionate when considered in line with the factors at paragraph 35 of EV Philippines.

16. Mr Otchie submitted that the third appellant was entitled to succeed under paragraph 276ADE (iv) of the Immigration Rules because it was not reasonable to expect him to return to the Philippines. He was now in year eight at the Royal Liberty Secondary school and was doing very well. He wanted to become a doctor. If he had to leave the UK it would seriously disrupt his education as he did not speak French, the language of education in Mauritius. It was the view of his school that he should be allowed to remain in this country. His friends were in the UK. In Mauritius the family would not be able to be accommodated by his grandmother or great-grandmother as their accommodation was too small. The reasonableness of return was also affected by the issue of

the third appellant's father. There was substantial evidence in the bundle about his domestic violence and the fact he had returned to the Philippines. Further these appellants did not have poor immigration history.

17. If Article 8 ECHR was considered generally on behalf of all the appellants it should also be considered that the second appellant had lived in the UK all her life, having been born here. Further the family would be in a precarious situation if they were forced to return to the Philippines. They were able to satisfy the considerations at paragraph 35 of EV Philippines; and had children who had lived in the UK for longer and had none of the poor immigration history as per Zoumbas. The factors as set out in s.117A of the Nationality, Immigration and Asylum Act 2002 were also in the appellants favour.

Conclusions – Re-making

18. I will first consider whether the third appellant can meet the requirements of paragraph 276ADE (iv) of the Immigration Rules. It is accepted by both parties that the other appellants cannot meet the requirements of the Immigration Rules relating to Article 8 ECHR. It is accepted by both parties that the third appellant meets all requirements of this provision, bar it is disputed by the respondent that he can show it would not be reasonable to expect him to leave the UK.

19. I do not accept Mr Tarlow's submission that it would be appropriate to find that the fact that the third appellant is not a British citizen meant it was of itself reasonable to expect him to leave the UK. No British citizen child will ever rely upon paragraph 276ADE (iv) of the Immigration Rules as they are obviously entitled to reside in the UK on the basis of their private life and it would never be reasonable to expect them to leave.

20. What is clearly of relevance is the fact that the third appellant would be returning to the country of his nationality and birth, where he would be entitled to have family and private life with his caring parent and sibling (the first and second appellants) and where his extended family, in the form of his grandmother and great-grandmother, live. There is no evidence before me that he would not be entitled to schooling in Mauritius or that his mother would not be able to obtain employment (she works in the UK as a healthcare assistant and has undertaken further studies in the UK: she has completed an advanced diploma in business administration, has done a number of health care short courses and is currently doing a BTEC subsidiary diploma in applied science) and support him and his sibling. I find he would probably have the basics of a normal life if he were returned to his country of nationality, Mauritius.

21. Factors which make go to making the removal of the third appellant less reasonable are that his stay in the UK has been from the age of 3 years

to 10 years at the date of application – and so will have no recollection of Mauritius; has undertaken his entire schooling in the UK and has made a private life for himself in this country with friends and bonds with schools and teaching staff. His teachers believe it is in his best interests to stay in the UK as he is well settled and having to re-start his secondary education would have a seriously detrimental effect on his future learning prospects (see letter from the Royal Liberty School dated 11th July 2014): he is doing well in the education system in this country. Returning to Mauritius would obviously set him back educationally as he would need to learn to speak, read and write in French, and reintegrate himself into a different education system.

22. The third appellant's time in the UK has also been marked with the very traumatic break-up of his parents' marriage: a matter which the first appellant says he witnessed and understood and which had a negative impact on him and his schooling, particularly during the period 2007 to 2010. The first appellant was subjected to horrific verbal, emotional, physical and sexual domestic violence from her husband, who was also a Mauritian national in the UK as a student. In October 2008, when the third appellant was six years old, she obtained a non- molestation and prohibited steps order from Romford County Court and an occupation order (excluding her husband from the family home). Despite these orders he continued to harass the first appellant, and left the UK and returned to Mauritius in late 2009 as he faced the likelihood of being put in prison for breaching the court orders. It is notable that the non-molestation order also forbad the third appellant's father from coming within 100 meters of his primary school at the time when he would be arriving and leaving.

23. In considering the reasonableness of the second appellant's return I must give proper consideration to his best interests and use the factors at paragraph 35 of EV (Philippines) as a useful guide. I find that the appellant has been in the UK during his entire memorable childhood for a period of seven years; he has reached the secondary stage of his education in this country and is entirely distanced from his country of proposed return. He has had to deal with the very traumatic departure of his father to Mauritius during this time in circumstances where his mother, the first appellant, was herself horrifically abused to his knowledge and where she expressed fears of the safety of his having contact with his father to the Family Court. I find it a particularly relevant fact that removal would require the appellant to go through a second major upheaval in his short life when he has had already to deal with this one which clearly disrupted his education and personal life. He would have linguistic problems with adapting to life in Mauritius which would disrupt his secondary education. It is correct that in all the circumstances that his mother sees it as being in the third appellant's best interests that he continues to remain in the UK and keeps the stability and good progress that has been established here particularly since "overcoming" the traumatic departure of his father from his life.

24. Ultimately, on consideration of all of the facts, I do not find it reasonable to expect the third appellant to leave the UK and thus find that he is entitled to leave to remain under paragraph 276ADE (iv) of the Immigration Rules.

25. I note however that whilst Mr Tarlow strongly appeared to concede that the third appellant had been in the UK for seven years at the time of application on closer analysis the papers before me indicate that the application was made some five weeks before this was the case.

26. If it were the case that the third appellant could not qualify under paragraph 276ADE (iv) of the Immigration Rules I would take s.117B(6) of the Nationality, Immigration and Asylum Act 2002 (henceforth the 2002 Act) as my starting point for a consideration of whether the removal of this family would be proportionate under the general law relating to Article 8 ECHR in light of their private life in the UK, the removal otherwise being in accordance with the law as being in pursuit of the legitimate aim of being in the economic interest of the UK in upholding a consistent system of immigration control. I note, and take as my starting point, that maintenance of immigration control is an important matter in the public interest.

27. This provision states that it is not required in the public interest to remove a person with a genuine and subsisting parental relationship with a qualifying child where it would not be reasonable to expect the child to leave the United Kingdom. At s.117D of the 2002 Act a qualifying child is one who is under the age of 18 years and who has lived in the United Kingdom for a continuous period of seven years or more. This provision does not set the date of application as the point at which the age of the child is assessed: and the third appellant has at the date of hearing been in the UK for eight years and nine months. I therefore find that the third appellant is a qualifying child. There is no doubt that the first appellant has a genuine and subsisting parental relationship with the third appellant.

28. My findings as to the fact that his removal would not be reasonable are set out above but at this stage I find it would be relevant to add in a consideration that the second appellant does not have British citizenship, in the light of the weight given to this factor by the Supreme Court and Court of Appeal in Zoumbas and EV (Philippines) respectively. However in this case I find that the weight to be given to the third appellant's private life ties with the UK, despite his being a Mauritian citizen, is greater due to the fact that he has already suffered the trauma of domestic violence against his mother and latent threats to his own safety and had to overcome the impact these had on his education and private life, and that in these circumstances despite his lack of British citizenship and entitlement to education in the UK and the fact that he would be returning with his mother and younger sister to his country of nationality it is not reasonable to expecting him to return to Mauritius to re-establish his private life there.

29. In terms of the other factors set out at s.117B of the 2002 Act the appellants are all able to speak fluent English and thus are deemed likely to be less of a burden on taxpayers and better able to integrate. They are also financially independent as the first appellant has shown herself able to accommodate and support all the appellants without recourse to public funds since her arrival, and has legally obtained employment and has higher level qualifications. The appellants have all been continuously lawfully resident, and at least the vast majority of their time (up until the refusal in October 2013 since when they have had leave on the basis of s.3C of the 1971 Immigration Act) has not been precarious. I thus find all these public interest factors fall in the appellants favour and add to my conclusion that their removal would not be proportionate.

30. In these circumstances I find that it would be a breach of the right to respect for family life for the second appellant not to be able to remain in the UK with her mother (the first appellant) and brother (the third appellant) which would not be proportionate to the legitimate aim given the strength of the family life ties and her own private life in the UK which includes birth in this country, six and a half years of residence here and the start of her primary schooling, and the considerations at s.117B of the 2002 Act set out above.

Decisions

31. The decisions of the First-tier Tribunal involved the making of an error on a point of law.

32. The decisions of the First-tier Tribuanl are set aside and remade de novo.

33. The appeals are remade allowing the appeals in accordance with Article 8 ECHR.

Deputy Upper Tribunal Judge Lindsley
4th October 2014

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make no fee award as I was not requested to do this and it appears that evidence given at the appeal and further documentation provided at the appeal stage were key to the success of this appeal.

Deputy Upper Tribunal Judge Lindsley
4th October 2014